454 STATE OF WEST VIRGINIA,
Kanawha County, To wit:

I, John C. Bond a Notary Public in and for the aforesaid county and state, do hereby certify that the foregoing deposition of C. W. Hillman was taken at the times and place and for the purposes herein above specified, before me in my said county of Kanawha.

Given under my hand this — day of July, 1912.

JOHN C. BOND,
Notary Public, Kanawha Co., W. Va.

(My commission as notary expires April 10, 1921.)

(Here follow pasters marked pages 455 to 463.)

464 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 15th day of March 1913.)

In Equity. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY
vs.
WM. G. CONLEY, Attorney General, et al.

This cause came on this day again to be heard upon motion duly served upon all the defendants; upon former motions made and the papers heretofore read herein, upon the joint and separate answer of all the defendants filed herein, and general replication thereto, upon former orders and decrees heretofore entered herein, upon depositions taken in behalf of the plaintiff and defendants filed herein, and upon the motion of the defendants to dismiss the preliminary injunction heretofore granted herein on the 28th day of August 1909, and upon the motion of the defendants to require the plaintiff to receive, take up and pay for the coupons issued by it under a former order of this Court, entered on said 28th day of August, 1909, and was argued by counsel.

Upon consideration of all of which, and after maturely considering the same, the Court is of the opinion, and doth find, that chapter 41 of the Acts of West Virginia Legislature for the year 1907 is constitutional upon its face, and that the two cent passenger
465 rate thereby imposed is not confiscatory in fact as to the plaintiff, the Norfolk & Western Railway Company.

It is, therefore, adjudged, ordered and decreed that the temporary injunction heretofore issued herein against the defendants, and entered on the 28th day of August, 1909, be, and the same is, hereby dissolved as to each and all of them. And, the defendants moving the Court to provide a manner in which the coupons issued by the plaintiff under said order of this Court entered on the 28th day of August, 1909, can be redeemed, it is further adjudged, ordered and decreed that, as the coupons may be presented, the plaintiff do receive and redeem from and pay to the respective parties holding the same, through its proper agents at each of its pay stations in the State of West Virginia, the coupons issued by it under said order of this Court, entered as aforesaid on the 28th day of August, 1909; and this cause is retained upon the docket of this Court, in order that any of the parties thereto may petition for the aid of the Court in the enforcement of this decree, in the event such aid should become necessary.

The plaintiff desiring to apply to the Supreme Court of Appeals of this State for an appeal and supersedeas in this cause, on its motion, this decree is hereby stayed for sixty days in order to give the plaintiff an opportunity to perfect said appeal.

466 STATE OF WEST VIRGINIA,
Kanawha County, ss:

I, Ira H. Mottesheard, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true transcript of so much of the record in the cause of Norfolk & Western Railway Company, a corporation, against Wm. G. Conley, Attorney General, and others, as I was requested by counsel to certify.

Given under my hand and the seal of said Court this 5th day of May 1913.

[Seal Circuit Court, Kanawha County, West Virginia.]

IRA H. MOTTESHEARD,
Clerk Kanawha Circuit Court.

Transcript $201.50.

467 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 14th day of May, 1913.)

In Equity. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY
vs.
WILLIAM G. CONLEY, Att'y Gen., et al.

On this, the fourteenth day of May, 1913, came the plaintiff, the Norfolk & Western Railway Company, by its counsel, Holt, Duncan & Holt, and, at the same time, came the defendants, by A. A. Lilly, Attorney General of the State of West Virginia, and it appearing to the Court that on the 15" day of March, 1913, a final decree was entered herein in favor of the defendants, and against the plaintiff, and that by said decree the terms thereof were stayed for the period of sixty days, in order to enable the plaintiff to apply to the Supreme Court of Appeals of the State of West Virginia for an appeal from and supersedeas to said decree; and it further appearing to the Court that said application has been made to the Supreme Court of Appeals of the State of West Virginia for said appeal and supersedeas, and that the same has been refused and denied by said Court; and it further appearing to the Court that the plaintiff now desires to apply for a writ of error to the Supreme Court of the United States, in order that the decree of this Court aforesaid, as well as the order of the Supreme Court of Appeals of the State of
468 West Virginia in denying an appeal from and supersedeas to said decree may be reviewed by the Supreme Court of the United States, and it further appearing that a further suspension of the said decree of the 15" day of March, 1913, entered herein is necessary in order to give the plaintiff fair and ample opportunity to obtain its said writ of error, It is, therefore, adjudged, ordered and decreed that the final decree entered herein on the 15" day of March, 1913, dissolving the injunction heretofore awarded herein

on the 23 day of August, 1909, be, and the same is hereby, suspended, and said injunction is continued in force for the period of thirty days from this date, in order that the plaintiff may, within said time, apply for, obtain and perfect its writ of error from the Supreme Court of the United States in the premises. The defendants and each of them, through A. A. Lilly, Attorney General for the State of West Virginia, excepted to the ruling of the Court in granting the foregoing stay, and entering the foregoing order.

469 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 10th day of June, 1913.)

In Chancery. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY
vs.
WM. G. CONLEY, Att'y Gen., et al.

This day came the Norfolk & Western Railway Company, by counsel, and presented in open Court a writ of error allowed by the Chief Justice of the United States on the fourth day of June, 1913, to the final decree in this cause, accompanied by the petition and assignment of errors presented to the Chief Justice, and upon which said writ was allowed, and, at the same time, tendered and filed in open Court a bond in the penalty of five thousand dollars ($5,000), approved by the Chief Justice, and conditioned for the prosecution of said writ of error to effect; and it is, thereupon, ordered, in obedience to said writ of error, that the Clerk of this Court transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings of the above entitled cause, with all things concerning the same, and return therewith the original writ of error, as well as the citation to the defendants, with the evidence of the service thereof, together with said petition for the writ of error and the assignment of errors.

470 (Bond referred to in the foregoing order is in the words and figures following, to-wit:)

Know all men by these presents: That we, the Norfolk & Western Railway Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation, as Surety, are held and firmly bound unto the State of West Virginia in the full and just sum of Five Thousand Dollars ($5,000) to be paid to the said State; to which payment well and truly to be made the said Norfolk and Western Railway Company and the said United States Fidelity and Guaranty Company bind themselves, their successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 27th day of May, 1913.

The condition of the above obligation is such, that whereas, the Norfolk and Western Railway Company seeks to prosecute its writ

of error to the Supreme Court of the United States to reverse a certain judgment or decree rendered by the Circuit Court of Kanawha County, West Virginia, on the 15th day of March, 1913, in a certain Chancery cause therein pending wherein said Norfolk and Western Railway Company was plaintiff and W. G. Conley, Attorney-General of the State of West Virginia, and others, were defendants;

Now, therefore, the condition of the above obligation is such, That if the above bounden Norfolk and Western Railway Company, plaintiff in error, shall prosecute its said writ of error to
471 effect and answer and pay all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] NORFOLK AND WESTERN RAILWAY COMPANY,
By WM. G. MACDOWELL, *Vice-President.*

Attest:
E. H. ALDEN, *Secretary.*

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By HENRY STEVENS,
Resident Vice-President.

Attest:
RHEO. HURTT,
Resident Secretary.

Approved the 4th day of June, 1913, by
EDWARD D. WHITE,
Chief Justice of the United States.

472 In the Circuit Court of Kanawha County, State of West Virginia.

In obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings of the within entitled cause, wherein the Norfolk & Western Railway Company was plaintiff, and W. G. Conley, Attorney General for the State of West Virginia, et al., were defendants, with all things concerning the same; and I likewise return herewith the original writ of error, together with the citation thereon, and the acceptance of service thereof by A. A. Lilly, Attorney General for the State of West Virginia, as well as the original petition for the writ of error and the assignment of errors presented with the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the Circuit Court of Kanawha County, West Virginia, this 10th day of June, A. D., 1913.

[Seal Circuit Court, Kanawha County, West Virginia.]

IRA H. MOTTESHEARD,
Clerk of the Circuit Court of Kanawha County, West Virginia

473 Supreme Court of the United States, October Term, 1912.

No. —.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
W. G. CONLEY, Attorney General for the State of West Virginia, et al., Defendants in Error.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Norfolk and Western Railway Company, respectfully represents that it is aggrieved by a final decree entered against it by the Circuit Court of Kanawha County, West Virginia, on the fifteenth day of March, 1913, in a certain equity cause then therein pending, wherein your petitioner was plaintiff, and W. G. Conley, Attorney General for the State of West Virginia, et al., were defendants;

That, after said decree had been entered, your petitioner, in conformity to the practice in the State of West Virginia, presented a petition and assignment of errors, accompanied by a certified transcript of the record of said decree and the proceedings in said cause, to the Supreme Court of Appeals of said State, that being the highest court in said State, praying for an appeal from and supersedeas to the said decree of the Circuit Court of Kanawha County, which said appeal and supersedeas were denied by said Supreme Court of Appeals by an order entered on the fourteenth day of May, 1913; as will appear from a copy of said petition and assignment of
474 errors and a copy of the order of said Supreme Court of Appeals denying the prayer thereof, which said copies are duly certified under the seal of said Supreme Court of Appeals and attached hereto as a part hereof;

That the decree aforesaid of the Circuit Court of Kanawha County, West Virginia, has become, and is, the judgment of the highest court in said State in which said cause could be heard and determined, and the record of said judgment and of the proceedings in said cause is still in said Circuit Court;

That said final judgment or decree of the Circuit Court of Kanawha County was entered in a suit wherein was drawn in question the validity of Chapter 41 of the Acts of 1907 of the Legislature of the State of West Virginia, on the ground that said State statute is repugnant to Article 14 of the Amendments to the Constitution of the United States, and said judgment or decree is in favor of the validity of said statute; and also directly involves the constitutionality of the said Act of the State of West Virginia, because the same interferes with and imposes burdens and restrictions upon the interstate commerce transacted by this petitioner, and that the said judgment or decree of the Circuit Court of Kanawha County

therein is against the constitutional right claimed by this petitioner, and is contrary to the Constitution of the United States; all of which will more fully appear in detail from the assignment of errors presented herewith and filed herein.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Circuit Court of Kanawha County, West Virginia, to the end that
475 the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and said judgment or decree reversed. And your petitioner will ever pray, etc.

THEODORE W. REATH,
JOHN H. HOLT,
JOS. I. DORAN,
Attorneys for the Norfolk and Western Railway, Petitioner.

476 STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, May 14, 1913, the following order was made and entered to-wit:

NORFOLK & WESTERN RAILWAY COMPANY
vs.
WM. G. CONLEY, Attorney General, et als.

This day came Norfolk & Western Railway Company, a corporation, by Jos. I. Doran, Theodore W. Reath, Lucien H. Cocke and Holt, Duncan & Holt, its attorneys, and presented to the Court a petition praying for an appeal from and supersedeas to a decree of the Circuit Court of Kanawha County, pronounced on the 15th day of March, 1913, in a cause in which said petitioner was plaintiff, and Wm. G. Conley, Attorney General, and others were defendants, with a transcript of the record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal and supersedeas prayed for is refused.

The petition referred to in the foregoing order is in words and figures, as follows, to-wit:

477 In the Supreme Court of Appeals of West Virginia, Charleston.

No. —.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Plaintiff Below, Appellant,

vs.

WILLIAM G. CONLEY, Attorney General, et al., Defendants Below, Appellees.

Petition.

To the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia:

Your petitioner, the Norfolk & Western Railway Company, would respectfully represent that it is aggrieved by a final decree entered by the Circuit Court of Kanawha County, West Virginia, on the fifteenth day of March, 1913, in a certain cause in equity then therein pending, wherein your petitioner was plaintiff, and W. G. Conley, Attorney General of the State of West Virginia, et al., were defendants.

A duly certified transcript of the record and proceedings
478 in said cause is herewith presented as a part hereof, from which the following matters and things appear:

Statement of Case.

On the fourteenth day of August, 1909, your petitioner, the Norfolk & Western Railway Company, as plaintiff, instituted its suit in chancery in the Circuit Court of Kanawha County, West Virginia, the County wherein the seat of government of said State is located, against W. G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, all of which Counties are situated in the State of West Virginia, having for its object the procurement of an injunction against said defendants, and each of them, enjoining, inhibiting and restraining them, and each of them, from instituting or bringing, or causing to be instituted or brought, any action, suit, prosecution or other proceeding against the plaintiff, or any of its officers, agents or employés, to recover any fine, penalty or damages occurring or accruing under or imposed by an Act of the Legislature of the State of West Virginia, entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation thereof," passed on the 20" day of February, 1907, approved by the Governor

of said State on the 24th day of February, 1907, and taking effect ninety days from its passage, being chapter 41 of the Acts of 1907.

479 & 480 Process was duly served upon all the defendants, and the bill of the plaintiff filed, wherein, among other things it was alleged that the plaintiff, your petitioner, was, and had been for some years past, the owner and operator of a system of railroads in the States of Virginia, West Virginia, North Carolina, Kentucky, Ohio and Maryland, with an aggregate mileage, main line and branches, of 1919.59 miles, and that of this mileage, main line and branches, 444.70 miles were located in the State of West Virginia, and distributed variously through the Counties of Jefferson, Wayne, Mingo, McDowell and Mercer in said State;

That the Legislature of the State of West Virginia passed an Act on February 20, 1907, approved by the Governor February 24th of that year, and to take effect ninety days from its passage, entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation thereof," which said Act is Chapter 41 of the Acts of the Legislature of West Virginia, regular and extra sessions for the year 1907;

That said Act sought to limit the passenger fares of the plaintiff (your petitioner) to two cents per mile, by providing, among other things, "that all railroad corporations organized or doing business in this State under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile", and by further providing that "any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this Act shall be fined for each offense not less than fifty dollars, nor more than five hundred

481 dollars; provided that nothing contained in this Act shall apply to electric lines and street railways owned or operated in this State";

That, at the date of the passage of said Act, as well as at the time it went into effect, the property of the plaintiff in the State of West Virginia was valued and assessed for taxation by the Board of Public Works of said State at $31,000,051.45, and that, at the time of the passage of said Act, and for a long time prior thereto, the plaintiff charged for the transportation of persons within the State of West Virginia a rate per mile not to exceed that prescribed by Sections 2472 and 2473 of the Code of West Virginia of 1906, which passenger rate so charged by it was reasonable, just and lawful, and approximated a rate per mile of 2.94 cents, and enabled the plaintiff to earn gross during the fiscal year ending June 30, 1907, from the transportation of intra-state passengers within the State of West Virginia the sum of $362,997.74; that the total gross earnings during said period within the State, including the earnings for the transportation of passengers, as aforesaid, amounted to $8,090,082.56, and that the total capital of the plaintiff according to said

valuation and assessment, apportioned on the basis of the gross earnings aforesaid between the earnings from the transportation of intra-state passengers within the State and the earnings from all sources within the State, would show the investment of the plaintiff within the State for the fiscal year ending June 30, 1907, and properly be allotted to the transportation of intra-state passengers therein, to have been $1,391,902.31;

That it reasonably cost, with proper and economical management, to earn the said sum of $362,997.74 (the gross earnings during the fiscal year ending June 30, 1907, from intra-state passengers within the State of West Virginia) eighty-five cents on each dollar
482 thereof, and that the return to the plaintiff during said year from its capital embarked and allotted to the business of transporting intra-state passengers in the State of West Virginia ($1,391,902.31) was at the rate of 3.7% per annum;

That, immediately upon the going into effect of the Act aforesaid; that is to say, upon the 21st day of May, 1907, the plaintiff, in obedience to said Act, established a two cent passenger rate within the State of West Virginia, and observed, and continued to observe, up to the time of the institution of this suit, all the provisions and requirements of said Act, with the following result; that is to say, during the fiscal year immediately following the date when the Act went into effect; that is to say, from the first day of July, 1907, to the first day of July, 1908, the gross earnings derived from the transportation of intrastate passengers within the State of West Virginia amounted to only $289,943.22, as against the $362,997.74 of the year before, and the necessary expense incident to the earning of said $289,943.22 was approximately 95% thereof; or, to put it another way, it cost about ninety-five cents to earn each dollar of said amount; and, treating the capital invested within the State and allotted to the transportation of intra-state passengers therein as being the same for the year 1908 that it was for the year 1907; that is to say, $1,391,902.31, the net earnings for the fiscal year ending June 30, 1908, derived from the transportation of intra-state passengers within the State of West Virginia approximated 1.04 per cent. per annum on said capital so allotted;

That, for the fiscal year ending June 30, 1909, the gross earnings under the two cent rate amounted to only $277,557.05, and that the expense necessarily incident to the earning of said amount was approximately 98.19 per cent. thereof, or, in other words, that
483 it cost about 98.19 cents to earn each dollar of said amount, with the result that, treating the capital invested in the State and allotted to intra-state passenger service as being the same that it was in the year preceding, made a net income to the plaintiff of approximately .38 of one per cent. per annum upon the capital therein invested and so allotted.

In other words, for the fiscal year ending June 30, 1907, the year immediately preceding the passage of the two cent rate statute by the West Virginia Legislature, and the installation by the plaintiff of the two cent rate thereunder, the plaintiff (when a charge of approximately 2.94 cents per mile was made for the carriage of intra-

state passengers) earned 3.7 per cent. per annum upon the capital invested on account of and charged to intra-state passenger service within the State of West Virginia; while, for the fiscal year next following the installation of the two cent rate; that is to say, the fiscal year ending June 30, 1908, the net per cent. per annum earned upon the capital invested in the State of West Virginia and allotted to intra-state passenger service only amounted to 1.04 per cent., and, for the fiscal year next following; that is to say, the year ending June 30, 1909, the net earnings upon said capital under said rate amounted to only .38 of one per cent.

The bill further charged that these diminished revenues resulted from the two cent rate, notwithstanding an honest, intelligent and economical management by the plaintiff of its railway properties, and that the effect of said legislative enactment had been, and is, to reduce the rates and revenues of the plaintiff, and decrease its earnings from intra-state passenger business in the State of West Virginia below what would be a reasonable compensation for the services rendered, and has been, and is, operating a confiscation of its
484 property, in violation of the law of the land;

That said Act has deprived, and is depriving, the plaintiff (your petitioner) of the rights guaranteed unto it by Section 9 of Article 3 of the Constitution of West Virginia, which provides that "private property shall not be taken or damaged for public use without just compensation", and also of the rights guaranteed to it by Sec. 10 of Article 3 of the Constitution of said State, which provides that "no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers";

Further that the penalties prescribed by the second section of said Act are so enormous as to prevent the plaintiff (your petitioner) from securing any judicial inquiry into the validity of the Act, and that its penal provisions were enacted for the purpose of so burdening any challenge of the Act in the Courts that the plaintiff would be compelled to submit, as has been the case, to the confiscation worked by said Act, and that the effect of said penalties is to deprive the plaintiff of the equal protection of the law, and constitutes a denial to the plaintiff of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protecton of the laws";

That said Act of the Legislature is also void as arbitrarily and artificially classifying railroads, such as the road of this plaintiff, fifty miles in length and over in one class, and subjecting them to the burdens and penalties of the Act, while exempting from such burdens and penalties all railroads under fifty miles in length.
485 The bill further alleges that, in the absence of the relief prayed in the bill, the work of confiscating the property of the plaintiff will continue, or the number of actions or penalties to which the plaintiff would be exposed will be enormous, subjecting

it to a multiplicity of indictments, suits and prosecutions for penalties, to its irreparable injury.

It was finally alleged in said bill that the defendant W. G. Conley, Attorney General of the State of West Virginia, and the other defendants, being the Prosecuting Attornies of the various Counties through which the line of the road of the plaintiff goes, are the officers charged under the Constitution and laws of the State of West Virginia with the institution and conduct of all prosecutions such as are provided for in the Act of 1907 complained of, and that they, and each of them, within their respective spheres, intend to, and will, enforce the provisions of said Act of 1907 against the plaintiff, unless they, and each of them, be enjoined from so doing. The bill thereupon prays for an injunction, as hereinbefore stated, against each of the defendants, enjoining, inhibiting and restraining them, and each of them, from proceeding against this plaintiff in any particular under said Act against which complaint is made.

To this bill, the defendant W. G. Conley, Attorney General, made a special appearance, and moved the Court to dismiss the same, for reasons set forth in writing, and, at the same time, demurred thereto; but his said motion and demurrer were overruled, and, after argument of counsel, a temporary injunction was granted by the Court against the Attorney General and the various Prosecuting Attornies,
and each of them, restraining and inhibiting them, and each
486 of them, from any and all prosecutions and proceedings of any nature whatsoever against the plaintiff on account of said Act.

The decree granting the injunction further provided that, in the event the plaintiff should put into effect upon its line or lines any rate or rates for the transportation of intra-state passengers within the State of West Virginia exceeding the rate named in the Act complained of, the plaintiff should give to any person traveling between points on its line in the State of West Virginia at a rate exceeding two cents a mile a coupon or coupons, showing the excess amount paid over and above the two cent rate, which coupon or coupons it was ordered, in the event the litigation should finally be determined against the plaintiff, should be redeemed, upon the delivery of the same, by the payment or return to the holder thereof of the excess charge.

On the thirtieth day of July, 1910, the defendants filed their joint and separate answer to the bill, wherein they admitted that they were the officials described in the bill as defendants, and admitted the passage of the Act by the Legislature of the State of West Virginia complained of, as well as the observance of its provisions by the plaintiff from the time it went into effect until the institution of the present suit. They further admitted that, at the time said Act took effect; that is to say, on the 21st day of May, 1907, the property of the plaintiff located in the State of West Virginia was valued and assessed by the Board of Public Works of that State at the sum of $31,000,051.45, and that, under the law as it then stood in West Virginia, by virtue of the provisions of Sections 2472 and 2473 of the Code of said State of 1906, the plaintiff had a right to

charge for passenger fares within the State more than two
487 cents per mile; but denied that said rate was reasonable or just.

They further admitted that it might be true, as alleged in the bill, that the gross earnings of the plaintiff during the fiscal year ending June 30, 1907, from the transportation of intra-state passengers within the State were $362,997.74, and that the total gross earnings of the plaintiff from all sources within the State during said year, while the three cent passenger law was in effect, were $8,090,082.56, as well as the fact that the total capital of the plaintiff, as valued and assessed in the State of West Virginia to be allotted to the transportation of intra-state passengers within said State was $1,391,902.31, "if apportioned on the basis of the gross earnings as aforesaid between the earnings from the transportation of intra-state passengers within said State and the earnings from all sources therein"; but denied that this was the proper method of apportioning the same, and denied that it reasonably cost the plaintiff eighty-five cents to earn each dollar earned by it in the transportation of intra-state passengers within said State during the fiscal year ending June 30, 1907, and that the return to the plaintiff thereon was only 3.7 per cent. per annum; but asserted that, on the contrary, the net return to the plaintiff on its capital invested in West Virginia in its intra-state passenger business during said year was largely in excess of six per cent. per annum, after the payment of all taxes and other expenses.

They also denied that the application of the Act of the Legislature complained of reduced the plaintiff's earnings upon intra-state passenger service within the State of West Virginia for the year ending June 30, 1908, to approximately 1.04 per cent. per annum
488 on the amount of the plaintiff's capital invested in said State, and allotted to such passenger service. They also denied, upon information and belief, that the gross earnings derived by the plaintiff from the transportation of intra-state passengers within the State of West Virginia for the year ending June 30, 1908, amounted to only $289,943.22, and asserted that said earnings were largely in excess of that amount; and denied that the expense necessarily incident to the earning of that sum was approximately ninety-five per centum thereof; but charged that the necessary expense was much less than that amount, and that the net profits arising from said service during said year within said State was largely in excess of six per cent. per annum on the capital or value of the property used and devoted to that purpose.

They likewise denied the allegations of the bill in respect in the gross earnings on intra-state passengers within the State of West Virginia for the year 1909, the expense in earning the same, as well as the fact that the net profit derived therefrom was approximately .38 of one per cent. on the plaintiff's capital invested in said State, and allotted to such service, and charged that said net profits for said year (1909) on the property of the plaintiff so invested, after the payment of taxes and all expenses etc., was largely in excess of six per cent.

The defendant further by their answer, and specifically, denied the right of the plaintiff, in determining the question of confiscation, to segg*r*egate its passenger earnings from its other earnings. The language of the answer upon this subject is as follows:

"But these respondents deny the legal or equitable right of
489 the plaintiff to segg*r*egate the passenger earnings from the other earnings of the plaintiff in determining whether said two cent passenger law operates as a confiscation of its property, and they aver that the entire earnings of the plaintiff from all sources should be considered in connection therewith."

They also denied that the penalties of the Act complained of were intended to burden or hinder the challenge by the plaintiff of the legality of said Act; that said Act violates either Sec. 9 of Article 3 of the Constitution of the State of West irginia, or Sec. 10 of said Article of said Constitution, and denied that the operation of the Act complained of results in the reduction of the plaintiff's revenues to the extent that it works a confiscation of its property, in violation of the Fourteenth Amendment to the Constitution of the United States.

A general replication was entered by the plaintiff to this answer, and, thereupon, depositions were taken, both for the plaintiff and for the defendants. The witnesses were not numerous, but their depositions were long, and involved many and complicated exhibits. Upon behalf of the plaintiff, the deposition of Joseph W. Coxe, its Comptroller, was taken, whereby it was shown that the receipts of the plaintiff from its intra-state passenger traffic within the State of West Virginia during the fiscal years ending June 30, 1908, and June 30, 1909 (the period during which the two cent passenger rate was put into force prior to the granting of the injunction herein), fell far below a reasonable and just return for the service rendered, amounting to less than two per cent. in the first year, and less than one per cent. in the second of said years upon the capital of
490 the plaintiff invested in said State, and allotted, as alleged in the bill, to its intra-state passenger service in said State.

In support of the answer, the defendants took the deposition of Mr. Hillman, an experienced railroad man, and an expert accountant, who, by a series of calculations, made and exhibits filed, undertook to show that the rate was not confiscatory in fact, but that the revenues of the road, when considered as a whole, notwithstanding the two cent passenger rate complained of, were reasonably remunerative. He admitted, however, that it cost the Norfolk & Western Railway Company ninety-seven and a fraction cents to earn each dollar received by it under the two cent passenger rate for the transportation of intra-state passengers within the State of West Virginia, and stated, after an examination of the books and accounts of the plaintiff and an analysis of its operating and other expenses and its earnings, that the two cent rate was not remunerative to the Norfolk & Western. This was the defendants' own witness, and, upon cross-examination, his exact language was:

"I should say that the percentage left after the payment of the operating expenses and taxes is, in my judgment, an inadequate

return for the capital employed in the passenger business". (Answer to Q. 2, page 77 of Hillman's deposition, Record page 388.)

And again the following question was propounded to him, and he made the following answer thereto:

"Q. 9. When you have heretofore testified that 97.4203 per cent. of the passenger earnings were consumed in paying the passenger expenses, you have included in those earnings not only the earnings derived from intra-state passenger fares, but also the earn-
491 ings derived from the mail and express business of the company, and extra baggage?

A. Yes, sir; and also some other slight passenger receipts."

(Hillman's deposition, pages 81-2; Record, pages 392-3.)

After the conclusion of the testimony, the cause was argued, and the final decree hereinbefore complained of was entered on the fifteenth day of March, 1913, whereby the Court found that Chapter 41 of the Acts of the West Virginia Legislature for the year 1907 is constitutional upon its face, and that the two cent passenger rate thereby imposed is not confiscatory in fact as to the plaintiff, the Norfolk & Western Railway Company; and, upon such finding, dissolved the preliminary injunction granted against the defendants on the 28" day of August, 1909, and adjudged, ordered and decreed that the plaintiff, upon presentation, receive, redeem and pay to the respective parties holding the same, all coupons issued by it under the order of the Court entered on the 28" day of August, 1909.

Your petitioner further represents that said decree is erroneous, and, as errors therein, assigns the following:

Assignments of Error.

I. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature of 1907 did not, and does not, deprive the plaintiff of the rights, privileges and immunities guaranteed to it by Section 9 of Article 3 of the Constitution of West Virginia, which provides that "private property shall not be taken or damaged
492 for public use without just compensation."

II. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature of 1907 did not, and does not, deprive the plaintiff of the rights, privileges and immunities guaranteed to it by Section 10 of Article 3 of the Constitution of West Virginia, which provides that "no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers."

III. The Court erred in holding that Chapter 41 of the Acts of West Virginia of 1907 does not, in violation of the Fourteenth Amendment to the Constitution of the United States, arbitrarily and artificially classify railroads within the State of West Virginia by applying its provisions to railroads, like the plaintiff's, fifty miles in length and over, while exempting from the burdens and penalties of such provisions all railroads under fifty miles in length.

IV. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature for the year 1907 was not intended by the severity of its penalties, and does not by said penalties, deprive the plaintiff of its property "without due process of law," or deny the plaintiff "the equal protection of the laws," in violation of Section One of Article 14 of the Amendments to the Constitution of the United States.

V. The Court erred in holding as a fact, contrary to the undisputed evidence in this case, that the enforcement of the intra-state passenger rate of two cents per mile within the State of West Virginia, in accordance with the provisions of Chapter 41 of the
493 Acts of the Legislature of the State of West Virginia for the year 1907, did, for the fiscal years ending June 30, 1908, and June 30, 1909, respectively, and does, produce a just and reasonable return to the plaintiff, the Norfolk & Western Railway Company, for the service rendered by it in such passenger traffic, and was not, and is not, confiscatory of the plaintiff's property, in violation of Section I of the Fourteenth Amendment to the Federal Constitution.

VI. The Court erred in holding by said decree that, in determining whether or not the two cent intrastate passenger rate applied to the Norfolk & Western Railway Company within the State of West Virginia by the provisions of Chapter 41 of the Acts of the Legislature of said State for the year 1907 was and is confiscatory, the intrastate passenger rates of said company could not be segregated from its other earnings, but that such question must be determined upon the consideration of all the earnings of said Railway Company, and that its intrastate passenger rates could be reduced to such a minimum as to impose a burden upon its interstate passenger and freight service.

VII. Said decree is in other respects irregular, unjust and erroneous.

Your petitioner, therefore, prays for an appeal from and supersedeas to said decree of March 15, 1913, in order that the same before you may be caused to come, to the end that the same may be reviewed and reversed, and such orders entered in this Court as the Circuit Court of Kanawha County should have entered therein.

NORFOLK & WESTERN RAILWAY COMPANY, *By Counsel.*

JOSEPH I. DORAN,
THEODORE W. REATH,
LUCIEN H. COCKE,
HOLT, DUNCAN & HOLT,
Counsel.

494 *Certificate of Counsel.*

I, John H. Holt, an Attorney practicing in the Supreme Court of Appeals of the State of West Virginia, do hereby certify that, in my opinion, the decree complained of in the foregoing petition is erroneous, and should be reviewed and reversed by this Honorable Court.

Given under my hand this eighth day of May, 1913.

JOHN H. HOLT.

495 STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, Wednesday, May 14, 1913, the following order was made and entered, to-wit:

This day came Norfolk & Western Railway Company, a corporation, by Jos. I. Doran, Theodore W. Reath, Lucien H. Cocke and Holt, Duncan and Holt, its attorneys, and presented to the Court a petition praying for an appeal from and supersedeas to a decree of the Circuit Court of Kanawha County, pronounced on the 15th day of March, 1913, in a cause in which said petitioner was plaintiff, and Wm. G. Conley, Attorney General, and others were defendants, with a transcript of the record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal and supersedeas prayed for is refused.

A true copy.

Attest:

WM. B. MATHEWS, *Clerk.*

496 STATE OF WEST VIRGINIA, *To-wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of said State, do hereby certify that the foregoing is a true, correct and complete transcript of the proceedings upon an application to said Court for an appeal and supersedeas in the cause of Norfolk & Western Railway Company, a corporation, vs. William G. Conley, Attorney General, et al., lately pending in the Circuit Court of Kanawha County, together with a true and correct copy of the petition praying for such appeal and supersedeas, as fully as the same appears of record and on file in my said office.

Given under my hand and official seal of the said Court, at Charleston, this 28th day of May, 1913, and in the fiftieth year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk of the Supreme Court of Appeals of the State of West Virginia.

497 In the Supreme Court of the United States, October Term, 1912. No. —.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia, et al., Defendants in Error.

And now, before the Justices of the Supreme Court of the United States of America, at the Capitol, in the City of Washington, comes the Norfolk and Western Railway Company, Plaintiff in Error, by its counsel, in the above stated case, and assigning error therein, says:

That in the record and proceeding in the aforesaid cause there is manifest error in this, to-wit:

1. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature for the year 1907 was not intended by the severity of its penalties, and does not by said penalties, deprive the plaintiff of its property "without due process of law," or deny the plaintiff "the equal protection of the laws," in violation of Section One of Article 14 of the Amendments to the Constitution of the United States.

2. The Court erred in holding that the enforcement of the intra-state passenger rate of two cents per mile within the State of West Virginia, in accordance with the provisions of Chapter 41 of the Acts of the Legislature of the State of West Virginia for the year 1907, did, for the fiscal years ending June 30, 1908, and June 30, 1909, respectively, and does, produce a just and reasonable return to the plaintiff, the Norfolk and Western Railway Company,
498 for the service rendered by it in such passenger traffic, and was not, and is not, confiscatory of the plaintiff's property, in violation of section one of the Fourteenth Amendment to the Federal Constitution.

3. The Court erred in holding that the intra-state passenger earnings of the Norfolk & Western Railway Company within the State of West Virginia, under the two cent passenger rate imposed by Chapter 41 of the Acts of 1907 of the Legislature of said State, could not be segregated from the other earnings of said Company in determining whether or not the provisions of said Act are confiscatory, and erred in holding that said Act was not confiscatory because the entire earnings of the road produced a reasonable return upon its capital invested, although the return from intra-state passenger service, considered alone, was not and is not remunerative; all of which was and is in violation of subdivision 3 of Section VIII of Article I of the Constitution of the United States.

Wherefore, the said Norfolk and Western Railway Company prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the said judgment and decision.

THEODORE W. REATH,
JOHN H. HOLT,
JOS. I. DORAN,
Attorneys for Plaintiff in Error.

499 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of Kanawha County, State of West Virginia, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, being the highest court of law or equity of

the said State in which a decision could be had in the said suit between Norfolk & Western Railway Company, plaintiff, and W. G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or
500 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff, Norfolk & Western Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourth day of June, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,
Chief Justice of the United States.

501 UNITED STATES OF AMERICA, *ss:*

To W. G. Conley, Attorney General of the State of West Virginia; George D. Moore, Prosecuting Attorney of the County of Jefferson; D. B. Hardwick, Prosecuting Attorney of the County of Wayne; S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo; Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Kanawha County, State of West Virginia, wherein Norfolk & Western Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this fourth day of June, in the year of our Lord one thousand nine hundred and thirteen.

EDWARD D. WHITE,
Chief Justice of the United States.

502 Office of the Attorney General of West Virginia.

CHARLESTON, WEST VIRGINIA.

I, A. A. Lilly, Attorney General for the State of West Virginia, do hereby accept service of the within citation for each and all of the defendants named therein.

Given under my hand this 9th day of June, 1913.

A. A. LILLY,
Attorney General of West Virginia,
and Attorney for Defendants.

Endorsed on cover: File No. 23,751. West Virginia, Kanawha County Circuit Court. Term No. 600. Norfolk & Western Railway Company, plaintiff in error, vs. W. G. Conley, Attorney General of the State of West Virginia, et al. Filed June 14th, 1913. File No. 23,751.

No. 197. OCTOBER TERM, 1914.

Supreme Court of the United States.

Supreme Court, U. S.
FILED
SEP 10 1914
JAMES D. MAHER
CLERK

NORFOLK AND WESTERN RAILWAY COMPANY,
Complainant in Error,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia, *et al.*, Defendants in Error.

BRIEF ON BEHALF OF THE NORFOLK AND WESTERN RAILWAY COMPANY.

JOSEPH I. DORAN,
THEODORE W. REATH,
JOHN H. HOLT,
LUCIEN H. COCKE,
Of Counsel for Norfolk and Western Railway Company.

OCTOBER, 1914.

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Supreme Court of the United States.

OCTOBER TERM, 1914.
No. 197.

Norfolk and Western Railway Company, Complainant in Error.

vs.

W. G. Conley, Attorney General of the State of West Virginia, et als., *Defendants in Error.*

BRIEF ON BEHALF OF THE NORFOLK AND WESTERN RAILWAY COMPANY.

STATEMENT OF CASE.

The Norfolk and Western Railway Company operates lines of railroad extending through and serving portions of the States of Virginia, West Virginia, Maryland, North Carolina and Ohio with

a total mileage 1919.5 and in West Virginia 444.7 miles (Record, page 5).

Prior to 1906, the standard maximum rate of passenger fares over its road was 3 cents per mile (Record, page 5). About that time, action was taken by the legislatures or commission of the States of Virginia, West Virginia and Ohio reducing the intrastate rate to 2 cents per mile, and in the State of North Carolina the rate was made 2¼ cents per mile. The rates so established were deemed by the company to be confiscatory.

In Virginia, relief was sought by the various railway companies, the plaintiff here included, in the Federal Court, culminating in the test case of Prentis *vs.* Atlantic Coast Line Company, 211 U. S., 210. Thereafter the Norfolk and Western Railway Company filed a petition with the State Corporation Commission of Virginia asking for a re-hearing of its order establishing a 2 cent rate; and, upon this re-hearing, the Commission decided that the 2-cent passenger rate was unjust, and established a rate of 2½ cents (Annual Report State Corporation Commission of Virginia of 1909, page 28.)

The rate in North Carolina had been established by the Legislature of 1907 at 2¼ cents; and, after controversy, the Governor convened the Legislature in special session for the purpose of reconsidering the subject; and thereupon the extra ses-

sion of 1908 established a rate of 2½ cents (Acts of North Carolina, 1908, page 154).

The validity of the 2 cent rate in Ohio has not yet been litigated by this Company.

Describing (*inter alia*) the Ohio status, Harlan, Chairman, in The Five Per Cent Case, 31 I. C. C., 351 (July 29, 1914), said at pages 407-8:

> "The need of additional revenues is greatest in central freight association territory, and existing statutes in Ohio, Indiana, Illinois, and Michigan may be obstacles to the raising of passenger fares in those states. But we are confident that if these statutory fares are clearly shown to be unduly burdensome to the carriers, the people of those great states will cheerfully acquiesce, as the people of New England have done, in reasonable increases, and that the necessary legislative authority will be promptly given. The traveling public is giving expression to its demand for better service, better accommodations, and for the adoption by carriers of all the devices that make for safety. A public that demands such a service can not reasonably object to the payment of a reasonable compensation therefor.
>
> The railroads in central freight association territory have, in the main, failed to separate passenger and freight operating expenses. The existence of the 2-cent laws may be due, in large part, to that fact. An accu-

rate ascertainment and frank disclosure of operating costs is the most effective protection against the possibility of unjust legislation, for we must assume that the public intends no injustice against the owners of these great properties that are devoted to the service of the public. The separation of freight and passenger expenses was recently discussed in *Separation of Operating Expenses*, 30 I. C. C., 676."

It thus appears that the standard rate of this Company at this time on its principal mileage is 2½ cents per mile, instead of 3 cents, which was the standard prior to 1906. This is the result of discussions, investigations, concessions and litigation, and this Company, in regard to its passenger rates, is in accord with the views of the public authorities of the States in which it operates, except the State of West Virginia.

On February 20th, 1907, the Legislature of West Virginia imposed a 2 cent passenger rate upon roads over fifty miles in length. A copy of the Act is printed as an appendix to this brief. This law became effective on the 21st May, 1907, and was observed by this Company for two fiscal years. The result of this test demonstrated that the Company should apply to the courts for relief, and a bill was then filed in the Circuit Court of Kanawha County, showing the actual result

of the operation of the 2 cent rate upon the revenues of the Company and the inadequate return upon capital invested in the plant necessary to perform this public service. The Act was challenged as confiscatory in violation of the Fourteenth Amendment (Record, page 22). The prayer of the bill was for an injunction restraining the enforcement of the law by the State and county officials charged therewith.

Upon the presentation of the bill to the Court the Attorney General of the State and the prosecuting attorneys of the various counties through which the road of the complainant runs, being the defendants in the cause, appeared specially and moved the Court to deny the application and dismiss the bill, on the ground that it was a suit against the State, which motion was argued and overruled. Thereupon, the defendants demurred to the bill, which demurrer was argued and likewise overruled, and a preliminary injunction was granted as prayed. Subsequently, the defendants filed their joint and several answer, upon which issue was joined and testimony was taken upon the issue of confiscation. In the meantime, that is to say, between the time of the filing of the bill herein and the time of the filing of the answer of the defendants, the similar case of the Coal & Coke Railway Company *vs.* Conley Attorney General, *et al.,* (67 W. Va.

Rep., page 129, had been decided by the Supreme Court of Appeals of West Virginia, and the Act here in question had been held to be constitutional upon its face, but unconstitutional as to the Coal & Coke Railway Company because confiscatory in fact; and, in consequence of this ruling, the contention in this case was thereafter confined to the question of confiscation in fact. In this respect, it differs from the case of the Chesapeake & Ohio Railway Company *vs.* Conley *et al.*, recently decided by this Court (230 U. S., 513), which only involved the constitutionality of the Act upon its face. No attempt was made to prove confiscation in that case.

Upon the completion of the testimony, the case at bar was argued and submitted and a decree entered dissolving the injunction (Record, page 246). Application was made for an appeal to the Supreme Court of Appeals of the State, but was refused, and thereupon a writ of error was sued out in this Court to the Circuit Court of Kanawha County, West Virginia, based upon the assignments of error hereinafter set out.

The evidence for the Company was that of Joseph W. Coxe, the Comptroller of the Company, familiar with its accounts and having charge thereof. The evidence for the defendants was that of C. W. Hillman, an accountant with experience

in railroad matters who had made a specialty of ascertaining cost in railway rate cases (Record, page 179-180). Under the laws of West Virginia, all railroad property within the State is assessed for taxation by the Board of Public Works at its "true and actual value" (W. Va. Code 1906, Sec. 696), and, in consequence, the plaintiff's witness herein accepted the valuation of the plaintiff's property by the State for taxation as the total capital employed by it in the State for all classes of business. This valuation was $31,000,051.45, and, appropriating this capital on the percentage of the gross earnings of the several classes of business, the witness arrived at the result that, for the fiscal year ending 1908, the return on intrastate passenger business in West Virginia was 1.04%, and, for the fiscal year 1909, 38/100 of 1%; these being the two years of the test of the 2 cent rate above described.

The defendants' witness, Mr. Hillman, made no distribution or allocation of capital, but had made an investigation of the books and records of the Railway Company in order to testify (Record, page 181), and he explained (Record, page 183 and the following pages) the basis upon which he made a division of operating expenses—see Exhibit C. W. H. No. 2, Record between pages 244 and 245. From his testimony it appears that, after distributing about 65% of the expenses or cost which

could be accurately distributed to the passenger service on the one hand or to the freight service on the other, he distributed the remaining 35% of cost according to the use-units deemed most logical and appropriate by him, such as engine miles, passenger car miles, etc. (Record, page 215.) It should be noted here that the Norfolk and Western Railway Company has, since its organization in 1896, kept accounts whereby it separates the respective costs of doing its freight and passenger business by allocating to each the items of expense which have been incurred in doing that particular business and, as the result of this allocation from month to month (Record, page 29), it has been ascertained that about 65% of the cost of doing each class of business can be definitely allocated. Hence Mr. Hillman, in allocating the cost of doing the passenger business in West Virgina, had at hand the actual allocation made by the Railway Company as to 65% of such cost. The remainder he distributed between the two classes of business on the various use-units set forth in his testimony as above described.

Mr. Hillman's exhibits disclose in detail the method whereby he ascertained the actual cost incurred by this Company in earning the revenue from intrastate passenger business. His investigation is summarized in his Exhibit No. 6 (Record between pages 244 and 245), which shows that

the Company earned from intrastate passenger business $62,123.25, and paid out in expenses, for the conduct of that business, $58,007.87. The operating ratio was 93.3754%, and, adding the proper proportion of taxes, 4.0449%, the operating cost, including taxes, was 97.4203%. For each dollar earned, therefore, by the Company during the period under examination in the conduct of its intrastate West Virginia passenger business, the Company expended 97,4203 cents in paying the actual cost of operation and taxes. The remainder of each dollar of revenue, 2.5797 cents, would be all that would remain for fixed charges, dividends, improvements to plant betterments, etc. Mr. Hillman accordingly drew the conclusion from his investigation: (Record, page 215) that "the cost of carrying a passenger one mile in the State of West Virginia was very close to two cents per passenger per mile," and, upon cross-examination (Record, page 213), testified as follows:

> "A. In regard to the question of the remuneration of the 2-cent rate in West Virginia, I would say that the rate is remunerative as regards the direct operating expenses and taxes chargeable against the 2-cent passenger receipts; that when we consider the plant that is necessary to operate the passenger business and the return upon that plant, the rate is not remunerative.

> Q. 2. In other words, as I understand, the 2-cent rate about reimburses the Norfolk & Western Railway Company the actual cost incident to doing the service of conducting and carrying the passenger, but gives practically no return to the railroad company for the capital invested and the risks incident to the performance of the service?
>
> A. I should say that the percentage left after the payment of the operating expenses and taxes is, in my judgment, an inadequate return for the capital employed in the passenger business."

It was unnecessary for Mr. Hillman to distribute capital, as his ascertainment of income and expense proved that there was no substantial return beyond expenses upon the intrastate passenger business of the Company in West Virginia. The expenses as he actually found them from the Company's books absorbed practically the whole of the operating revenue from that branch of the business.

Thus confiscation appears from the testimony if the intrastate passenger business of the Company be considered alone. But the State advances the contention (see XI of the answer, Record, page 19), that

> "These respondents still further deny the legal or equitable right of the plaintiff to segregate its passenger business from that of its freight and other business, or to divide

> any of its earnings from any source or sources, in determining the constitutionality of said Act, and they aver that the entire earnings from all sources should be considered in connection therewith."

The answer then draws the conclusion, that, as the total return upon *all* of the Company's business in West Virginia, freight and passenger, state and interstate, was not confiscatory, the bill could not be maintained. Mr. Hillman's testimony did not follow the bill but added together the intrastate passenger and freight earnings in West Virginia to prove a reasonable return; see Exhibit No. 7, Record between pages 244-5. The Circuit Court, as we have seen, dissolved the injunction (Record, page 246) on the ground "that the two-cent passenger rate" imposed by the West Virginia Act was "not confiscatory in fact as to the" Norfolk and Western Railway Company, this finding being, in view of the pleadings and evidence as above set forth, based upon the legal theory that the intrastate passenger business and earnings could not be segregated from the intrastate freight business of the Company in West Virginia for the purpose of determining confiscation.

It will be seen that the Comptroller for the Company and the expert for the defendants, although traveling in part by different routes, ar-

rived at the same result, viz.: that the revenues of the plaintiff derived *solely* from its West Virgina intrastate passenger service, based upon a two-cent rate, do not furnish a reasonable return upon the capital devoted to such service. The apportionment of capital made by the plaintiff's witness was based upon gross earnings, a method which, though not accurate, is sufficient if otherwise aided, and it is plain from his exhibits (Exhibit B-2, Exhibit C-2 and Exhibit D-2) that this is a case where the facts "show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods,"—a case in which "errors attributable either to valuation or to apportionments cannot be regarded as sufficiently great to change the result." The expert for the State made no direct distribution of capital, but he did make an accurate distribution of cost between the passenger and freight business of the road so as to delimit in a comparative way the Company's total capital used for intrastate passenger service, and to show that the return from West Virginia intrastate passenger service is so completely eaten up by expense as to make the inquiry concerning the amount of capital embarked in the particular class of service immaterial.

And if the evidence of both parties unites, as in

the case at bar, to show inadequate earnings, the result is confiscation.

The question to which this brief will be addressed is one of law and the only question which arises upon the Record, namely;

May earnings from intrastate passenger business be segregated in order to determine confiscation?

ASSIGNMENTS OF ERROR.

Assignment of error No. 1 (Record, page 262) is hereby abandoned.

Assignment No. 2: The Court erred in holding that the enforcement of the intrastate passenger rate of two cents per mile within the State of West Virginia, in accordance with the provisions of Chapter 41 of the Acts of the Legislature of the State of West Virginia for the year 1907, did, for the fiscal years ending June 30, 1908, and June 30, 1909, respectively, and does, produce a just and reasonable return to the plaintiff, the Norfolk and Western Railway Company, for the service rendered by it in such passenger traffic, and was not, and is not confiscatory of the plaintiff's property in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

Assignment No. 3: The Court erred in holding that the intrastate passenger earnings of the Norfolk & Western Railway Company within the State of West Virginia, under the two cent passenger rate imposed by Chapter 41 of the Acts of 1907 of the Legislature of said State, could not be segregated from the other earnings of said Company in determining whether or not the provisions of said Act are confiscatory, and erred in holding that said Act was not confiscatory because the entire earnings of the road produced a reasonable return upon its capital invested, although to the return from intrastate passenger service, considered alone, was not and is not remunerative; all of which was and is in violation of subdivision 3 of Section VIII of Article I of the Constitution of United States.

BRIEF OF ARGUMENT.

The earnings from intrastate passenger business must be separated from all other earnings to determine whether the Act is confiscatory.

(*Both assignments of error, 2 and 3, present the same error.*)

The State has regulated the passenger rates intrastate separately by the Act under examina-

tion. The courts must make the same separation in determining whether the Act is confiscatory. The point was decided as between state and interstate rates in Smyth *vs.* Ames, 169 U. S., 466, wherein Mr. Justice Harlan, in holding the Nebraska freight rate law of 1893 unconstitutional as depriving railroads of property without due process, said:—

> "In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it."

In Railroad Company *vs.* Philadelphia, 220 Penna. 100 (1908), the State had regulated intra-state passenger rates by an Act limiting such rates to a maximum of two cents a mile. Held that inquiry as to confiscation should be limited to the rates so regulated. The claim of the State was that intra-state passenger and intra-state freight revenues should be combined to determine confiscation. Mitchell, C. J., said:—

> "It would be sufficient answer to say that the Legislature itself in the Act of 1907 has treated the passenger traffic as a separate and

> independent subject of examination and regulation."

And later he said that carriers "should not be required to do any part of their business in an unbusinesslike way with a resulting loss;" and he added that "if part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest." And further he said: "The corporation is entitled to make a fair profit on every branch of its business subject to the limitation that its corporate duties must be performed even though at a loss."

If Governmental authority regulate a particular rate, then that rate may be separately examined and the courts will annul the Governmental regulation if unlawful. In Southern Railway *vs.* St. Louis Hay & Grain Company, 214 U. S., 297, the Interstate Commerce Commission had held that a reconsignment charge should cover only the expense to the carrier and exclude any profit; but this court in reversing the decision said, By Mr. Justice Brewer, writing the opinion (page 301):—

> "If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that

> privilege. It is justified in receiving some compensation in addition thereto."

Down to the detail of a single rate or charge regulated by Government this court will give relief against confiscation. If Government, State or Federal, select a larger section or division of the carrier's business for regulation, then lawfulness may always be determined by considering that section separately from all the rest of the carrier's business.

In the recent decision (July 29, 1914) of The Five Per Cent Advance of Freight Rates Case, 31 I. C. C., 351, Harlan, Chairman, said at page 392:

> "We know of no provision of law under which we should be justified in increasing freight rates to provide a return upon property used exclusively in the passenger service, much less to take care of losses incurred in such service. In our opinion each branch of the service should contribute its proper share of the cost of operation and of return upon the property devoted to the use of the public."

In I. C. C. *vs.* U. P. R. Co., 222 U. S., 541, Mr. Justice Lamar, in upholding the validity of an order of the Interstate Commerce Commission reducing certain lumber rates of the defendant, said:

> "Where the rates as a whole are under consideration, there is a possibility of deciding,

> with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate."

In the Consolidated Gas case from New York (212 U. S., 19), this Court declared that a Gas Company having a monopoly was "entitled to 6% on the fair value of its property devoted to the public use."

In addition to reasonable return upon investment the railway is also entitled to sufficient income to provide for obsolesence of its property. This court said in Knoxville *vs.* Knoxville Water Company, 212 U. S. 1:—

> "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement.

> It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning."

In the case at bar confiscation is proven and admitted by the State if, as the cases show must be done, the intrastate passenger business is considered separately. The decree should be reversed.

JOSEPH I. DORAN,
THEODORE W. REATH,
JOHN H. HOLT,
LUCIEN H. COCKE,
Of Counsel for Norfolk and Western Railway Company.

OCTOBER, 1914.

APPENDIX.

ACTS OF WEST VIRGINIA—1907. REGULAR AND EXTRA SESSIONS PAGES 226-27. CHAPTER 41.

(Senate Bill No. 15.)

AN ACT relating to and regulating passenger rates upon railroads in the state of West Virginia, and prescribing penalties for the violation thereof.

(Passed February 20, 1907. In effect ninety days from passage. Approved by the Governor, February 24, 1907.)

Be it Enacted by the Legislature of West Virginia:

SEC. 1. That all railroad corporations, organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents many be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; *provided,* that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company,

shall be issued and delivered to such passenger; and, *provided, further,* that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state.

SEC 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; *provided,* that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state.

SEC. 3. All acts or parts of acts inconsistent herewith are hereby repealed.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 600.

NORFOLK & WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.) *In Equity.*
W. G. CONLEY, ATTORNEY GENERAL FOR THE STATE OF WEST VIRGINIA ET AL.,
Defendants in Error.

NOTICE

To the Norfolk & Western Railway Company:

You are hereby notified that, at twelve o'clock, noon, March 23, 1914, or as soon thereafter as counsel can be heard, the following motion to advance the above entitled cause will be presented to the Supreme Court of the United States.

A. A. LILLY,
Attorney General of West Virginia.

MOTION TO ADVANCE

And now come A. A. Lilly, successor in office to William G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, J. L. Stafford, successor in office to S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, F. C. Cook, successor in office to Robert R. Smith, Prosecuting Attorney of the County of McDowell, and A. M. Sutton, successor in office to John R. Pendleton, Prosecuting Attorney of the County of Mercer, and move this Court to advance the above entitled cause for an early hearing.

STATEMENT OF MATTER INVOLVED

The cause stands upon a writ of error from this Hon-

orable Court to the Circuit Court of Kanawha County, West Virginia, wherein a bill was filed by the Norfolk & Western Railway against the Attorney General of the State of West Virginia and the Prosecuting Attorneys of the various counties of said State through which the line of railway of the plaintiff runs, praying an injunction against said county and state officials, restraining them, and each of them, from the enforcement against the Norfolk & Western Railway Company, by action, fine, prosecution or otherwise, of the provision of an Act of the Legislature of the State of West Virginia passed on the twenty-second day of February, 1907, entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation thereof," fixing a maximum two-cent passenger rate per mile upon all intrastate passengers carried by steam railroads of a certain classification within the State of West Virginia, upon the ground that said Act was unconstitutional on its face and has operated, and is operating, a confiscation of the property of the Norfolk & Western Railway Company, in violation of Article XIV of the Amendments of the Constitution of the United States.

A preliminary injunction was granted, and, after the defendants had filed their answer, denying the unconstitutionality of said act on its face, and denying the confiscation, and alleging the validity of the statute, testimony was taken upon both sides, and on the 15th day of March, 1913, the Circuit Court of Kanawha County entered a final decree holding that said Act of the Legislature was counstitutional upon its face and that the Passenger Rate therein prescribed was not confiscatory in fact to the plaintiff, dissolving the peliminary injunction and ordering a redemption of the coupons issued by plaintiff for the excess of fares above the rates prescribed by the Act, which coupons had been issued under the provisions of a former decree.

Plaintiff applied to the Supreme Court of Appeals of West Virginia—that being the highest court in said state—for an appeal from and supersedeas to said final decree of the Circuit Court of Kanawha County, which appeal

and supersedeas was refused by said Supreme Court of Appeals on the 14th day of May, 1913.

REASONS FOR THE APPLICATION

This cause should be advanced for an early hearing for the following reasons:

First. The lines of railroad of the Norfolk & Western Railway Company traverse five counties in the State of West Virginia, and carry a large number of intrastate passengers, and said Company has, from the date of the institution of the present suit, that is to say, from the fourteenth day of August, 1909, until the persent time, maintained an intrastate passenger rate in the State of West Virginia largely in excess of the rate prescribed by said statute and has issued, and continues to issue, to each purchaser of an intrastate ticket a coupon attached to the ticket, from which the excess fare of each intrastate passenger over and above the statutory rate prescribed may be determined, which excess was adjudgd by the Circuit Court of Kanawha County, to be repaid to the holder of the coupons. Large sums of money in the aggregate have been collected, and are being collected, by the Railway Company, which will only be repaid upon the preservation and presentation of said coupons at the end of this litigation. There is no central place where such coupons can now be deposited for future redemption, and many of them are for small amounts, and many passengers receiving them do not understand their purpose or object; and, if the litigation is long delayed, many of these receipts or coupons will be mislaid or lost, which operates to the benefit of the said railway company and to the injustice of the traveling public compelled to pay the illegal rate of fare, and the interests of the State and of the citizens thereby jeopardized; and,

Second. The mere pendency of this suit, in consequence of the decision of the Supreme Court of Appeals of the State of West Virginia, suspends, in the absence of a supersedeas bond, the operation of the judgment below, and nullifies a regularly enacted statute of the State of West Virginia, and prevents the officials of such State

from enforcing its provisions, although the same has been held to be constitutional upon its face both by the Supreme Court of Appeals of the State of West Virginia and by this Honorable Court, leaving only for determination in this case the question whether or not it operates a confiscation in fact of the property of the Norfolk & Western Company.

C. & O. Company v. *Conley & Avis*, 67 W. Va., 129;
C. & O. v. *Conley, Atty. Gen.*, decided June 16, 1913, 33 Sup. Ct. Rep, 386.

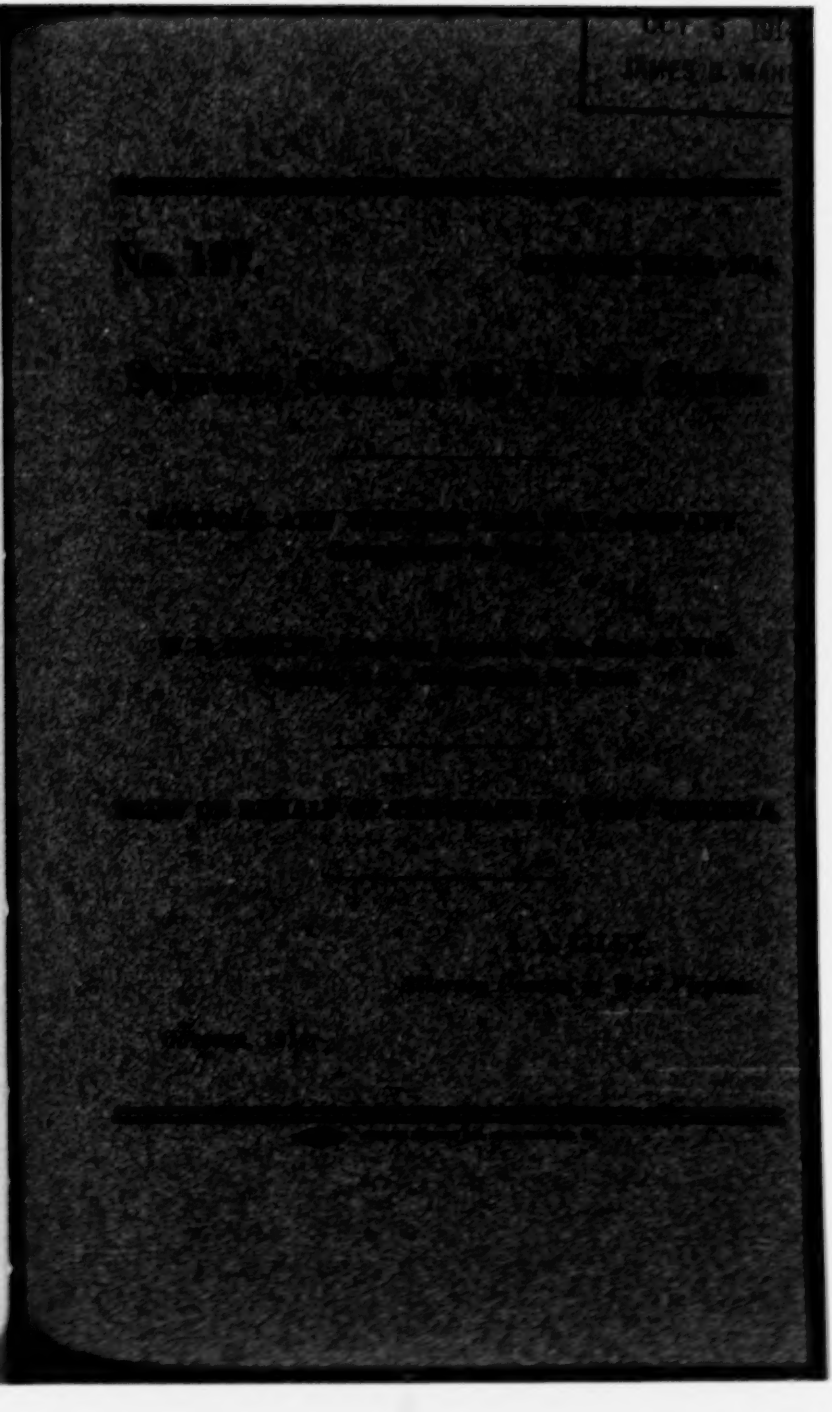
Third. While Wm. G. Conley, Attorney General, and the various Prosecuting Attorneys of the counties through which the said railway runs are named parties defendant, in truth and in fact this is a cause against the State of West Virginia wherein the said railway company is attacking and seeking to hold for naught the "two cent rate law" of said state, on the ground that said law is unconstitutional on its face and confiscatory in fact as to said plaintiff. The rights not only of said defendants are affected therein, but the entire citizenship of said state, as well as the traveling public of other states and countries is involved. The interests of the state and its citizenship are so directly affected,—the cause is one in which the general public has such a vital interest,—that the matters herein should be determined at the earliest practical date.
Sec. 949, Rev. Stat.

For the foregoing reasons, it is respectfully submitted that the public interests of the State of West Virginia, as well as the private interests of the traveling public and of its citizens, require an early disposition of this controversy; and this Honorable Court is respectfully requested to advance this cause upon its docket for hearing at an early date.

A. A. Lilly.
Attorney General for West Virginia.

Notice of the foregoing motion to advance is accepted this 19th day of February, 1914.

THEODORE REATH.
JOHN H. HOLT.
Attorneys for N. & W. Ry. Company.



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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 197.

NORFOLK AND WESTERN RAILWAY COMPANY,
Complainants in Error.

vs.

W. G. CONLEY, Attorney General of the State of West Virginia, et als., *Defendants in Error.*

BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA.

STATEMENT.

This is the only remaining two cent rate case in West Virginia. Four railroads, including Complainant in Error, the Chesapeake & Ohio, the Coal & Coke and the Virginian Railway, instituted suits in equity to annul the two cent rate Act of 1907. The two latter were recently constructed comparatively, and through sparsely settled and undeveloped territory and obtained decrees in the state courts against its enforcement as to them, because their returns from freight, passenger and all sources would not allow the passenger revenues to be

reduced. The Virginian Railway decision was satisfactory to the State, and was not appealed from the Circuit Court; but the decree in the Coal & Coke case held the Act to be unconstitutional on its face, and was appealed to the Supreme Court of the State, and was reversed in that particular.

Coal & Coke v. *Conley and Avis,* 67 W. Va. 129.

The Chesapeake & Ohio alleged confiscation, but afterwards abandoned the allegation, appealed to this Court upon substantially the same grounds set out in the first assignment of error in this case, and because of the classification, and because of interference with the railroad as an interstate carrier. The State decision was affirmed.

Chesapeake & Ohio Railway Co. v. *Conley, et al.,* 230 U. S. 513.

Hence the first assignment of error in this case is abandoned.

All the other numerous railroads in West Virginia have uncomplainingly obeyed the two cent law from its inception.

The issue in this case is that of "confiscation."

Two main questions are presented by the record:

I.

(a) Does the railroad properly show the capital invested in its intrastate passenger service used and useful in that service?

(b) Does the railroad properly show the earnings and expenses derived from and chargeable to its intrastate passenger business?

These are absolutely necessary factors in determining the rate of return received.

II.

Should the railroad company be allowed to segregate

its intra passenger earnings from all other earnings in its attempt to show confiscation?

ARGUMENT.

I.

(a) Does the Railroad Properly Show the Capital Invested in Its Intrastate Passenger Service Used and Useful in That Service?

The segregation of the freight and passenger earnings, expenses and returns by both Mr. Coxe, an expert for the Railway Company, and by Mr. Hillman, an expert for the State, are questioned by each other, and are unsatisfactory and somewhat confusing. The railroad fixes as a basis the sum of $1,391,902.31 as the value of its property in W. Va. used and useful in carrying intra passengers, and on which sum rates should be based, and adheres to this basis for the three years in which it questions the two cent rate. It is the basis on which its entire superstructure of figures is built. This basis is ascertained by taking the *valuation of its property as a going concern made by the Board of Public Works for purposes of taxation,* for the year 1907, to-wit, the sum of $31,000,051.45 and dividing it between the passenger and freight traffic according to the gross earnings from each; the entire gross earnings in the State were $8,090,-028.56 and the gross intra passenger revenue was claimed to be $362,997.74 or 4.49% of the entire gross earnings. This 4.49% applied to the assessed value of $31,000,051.-45 produces the $1,391,902.31 used by the railway as the value of its property used in intra passenger service. (Answers to questions 22 and 23, p. 26, record.) (Also paragraph 2 of bill, p. 5, record.) This valuation is improper for a rate basis.

People v. *N. Y. State Board,* 199 U. S., 1 Sup. Ct. 705, 50 L. ed. 65.

San Francisco v. *Dodge,* 197, U. S. 70, 25 Sup. Ct. 348, 49 L. ed. 669.

"Valuations placed upon railway properties by the State Assessor for purposes of taxation do not afford an adequate basis for a determination as to the fair value of the property when testing the reasonableness of State regulation of railway rates especially where the principles governing the assessment are not properly shown."

4th pt. Syllabus *Missouri Rate Cases*, 230 U. S. 474, 57 L. ed. 1571.

"A division of the value of the property of an interstate carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state, does not give a sufficiently accurate measure of the value of the use of its property in intrastate business to serve as a basis of a judicial holding in a close case, that the intrastate rates, as fixed by the State, are confiscatory."

8th pt. Syl. *Missouri Rate Cases.*

Allen v. *St. Louis F. M. & S. R. Co.*, 230 U. S. 552; 57 L. ed. 1625.

Chicago M. & St. R. R. Co. v. *Tompkins*, 176 U. S. 167; 44 L. ed. 417.

As a result of this basis, and not taking into account any of the earnings from interstate passengers allowable to West Virginia, he makes the return to the railroad for the year ending June 30, 1907, 3.73% omitting expenditures for additions and betterments, which if charged, would reduce the return to 2.15% (p. 26, Q. 27, record). For the year ending June 30, 1908, 1.04% (p. 36., Q. 78, record). For 1909, no return. (See Ex. J. W. C., J-1, p. 121.)

Witness for the State, Mr. Hillman, does not attempt to place any valuation upon the property of the railroad in West Virginia used and useful in its business for either passenger or freight purposes.

His tables and analysis are based upon the expenses and income as shown by the figures of the railroad company. Asked how he would determine the capital devoted to intra passenger trains on p. 119, record, after testifying that he had made no computation of such capital he said, in answer to cross-question 4:

> "I would determine the total value of the property in the State of West Virginia. I would then take the expense account as I have determined, and find the relation of each one of these expense accounts to the total expenses in West Virginia and assign that per centage of the capital to the business in hand."

His calculations are based upon the revenues and expenses of the intra passenger business (not taking into account any amount allowable to West Virginia from interstate passenger revenues) for the months of Nov., 1909, and May, 1910; because he had used those two months in an earlier controversy between the railroad and coal operators concerning coal shipments to the Great Lakes, which prior examination facilitated his present examination of the railroad figures, and his evidence in this case. (p. 182, Q. 9, record.)

(b) Does the Railroad Company Properly Show the Earnings and Expenses Derived from and Chargeable to Its Intrastate Passenger Business?

In the computations and tables made by both of these witnesses of intra passenger receipts, no account whatever was taken of the portion of inter state passenger receipts which should be added to the revenues derived from the West Virginia passenger trains, and the use of other property in West Virginia devoted to the inter state passenger traffic. On p. 48, record, Mr. Coxe was asked cross-question 6.

> Q. "Then no amount for the revenue to your company from interstate passengers going from an other state into West Virginia, and also going from West Virginia into another State were included in this amount?" ($362,997.74 derived from intrastate passenger fares in 1907.)
>
> Ans. "That was from the transportation of intrastate passengers exclusively."

Mr. Hillman was asked p. 212, record:

> Q. 66. "Do your accounts, as shown by your exhibits, take into consideration any part of the passenger fares received from interstate travel."

Ans. "No, sir; the interstate is entirely eliminated from the earnings, and by my method, from the operating expenses. None of the West Virginia proportion of the interstate traffic is taken into account, either in the earnings or method I have of dividing the expenses."

Q. 67. "If West Virginia's proportion of the interstate travel had been taken into your computations, would it not have materially increased the passenger revenues?"

Ans. "Yes, sir; it would have increased the passenger revenues both gross and net."

A serious error in basis chosen by the Railroad Company appears on page 31, wherein Mr. Coxe states that the expenses of a division partly in one state and partly in another are subdivided between states on the basis of the mileage of track in each state through which that division runs. This method sounds reasonable but is far from such. For example, the main line of a division, having a heavy tonnage, numerous trains, heavy grades, and, by reason of geographical conditions an expensive piece of track to keep in repair, may be entirely in one state. The remainder may be a branch line with scarcely any tonnage, few trains, easily kept in repair, and lying wholly within another state, and yet on the Norfolk & Western basis Mr. Coxe would charge to that state in which the branch line was located that percentage of the expenses for both the main line and branch line which the track mileage of the branch line bore to the total track mileage of the main line and branch line regardless of the actual expenses incurred by each. This basis is simply chosen by the Norfolk & Western Ry. Co. in order to facilitate and expedite the work, and serves its purpose in making reports for comparative purposes, but does not show a true statement of expenses any more than would the division by two of a man's salary who had charge of two departments show the amount which should be properly charged to each department. The correct basis would be the amount of his time spent in each department.

The division of expenses as between passenger and freight is made by the Norfolk & Western Ry Co. upon the basis of allocations as far as their accounts show, and then the common items of expenses, with the exception of engine repairs, are divided on the basis of road engine miles, which it is claimed assigns 20% to passenger and 80% to freight all show the fallacy of these percentages below. The engine repairs were divided by the railway company between passenger and freight upon the basis of engine miles both road and yard, all switch engine miles being considered as freight. Mr. Coxe, by treating his engine repairs in this manner, recognized the fact that yard expenses are a very important item, not only in the total cost of operatting a road, but also in dividing these expenses between freight and passenger, but in no other instance save the actual yard expenses themselves has he considered the expenses accruing due to yard service in his division between freight and passenger.

The road engine percentages of 20% passenger and 80% freight have been adhered to by the Norfolk & Western Ry. Co. for a number of years without change—their origin being lost in the mists of antiquity, "as a means of facilitating and expediting the work," to quote their witness, Mr. J. W. Coxe, who also states, on pages 75 and 76, in answer to question 102, "in the operation of a railroad it is essential that you should have a percentage easy of calculation."

The choice of one general factor, together with the changing of that factor to one which is easy of calculation would suggest to those familiar with railroad statistics that it was done in order to make comparisons from year to year more than with the idea that it would show a true statement of facts and relation of expenses. However, these road engine mile percentages, 20% passenger and 80% freight, are for the entire Norfolk & Western Ry.

Co. system some previous year, and do not represent a true relation of the road engine miles in West Virginia or even the system for the current year which, according to Mr. Coxe's own computation (page 77) was 16.23% passenger and 83.77% freight. Mr. Coxe stated on page 78, that if a part of the Norfolk & Western line in West Virginia were separated from the Norfolk & Western system he would use a percentage for that line so separated based upon the road engine mileage, passenger and freight, on the line so separated. This is in itself an admission on his part that the actual relation and percentages in West Virginia should have been used in making up his exhibit in place of the percentages for the system, which were so changed as to be easy of calculation. Mr. Hillman in his analysis used the actual percentages in each and every instance and did not in any one instance change a figure so that it would be easy "of calculation" or to facilitate or expedite his work.

Had Mr. Coxe used the actual road engine mile percentage in West Virginia for the fiscal year ending June 30, 1910, he would have assigned considerably less expenses to intrastate passenger than he did show, for the following reasons: In round figures 60% of the total operation expenses can either be directly allocated or assigned on factors so closely related to the expense that they can be taken as the equivalent of a direct allocation. This would leave 40% of the West Virginia expenses to be assigned to passenger and freight on the basis of 20% passenger and 80% freight. Applying the 40% common expenses to the total expenses for the year ending June 30, 1910, namely $4,921,368.50, J. W. C.'s exhibit K. L. page 122, we would get for our unallocated amount $1,968,547.40, 20% of which on Mr. Coxe's basis would charge to passenger $393,709.48, whereas the actual West Virginia percentage of 16.23% would only charge $319,495.24, a difference of $74,214.24. Deducting this $74,-

234.24 from Mr. Coxe's passenger expenses amounting to $562,608.24, we would have as corrected expenses to passenger $669,300, which is 87.83% of the earnings of $786,726.00. Applying 87.83% to the intra passenger earnings of $386,505.10, we would get $331,529.12 as intra passenger expense, leaving $43,975.98 as intra net earnings from operation instead of $10,651.85 as shown by Mr. Coxe. Deducting taxes and further expenses and adding miscellaneous income, we would have available from intrastate passenger for surplus and dividends $5,862.88 instead of a loss of $27,661.25, or a total difference of $33,524.13 between amounts shown by Mr. Coxe and the amount which would have been shown had Mr. Coxe used the engine mile percentage for West Virginia, a handy little burden for intrastate passenger to bear, because 20% was such "a convenient factor to use."

Had Mr. Coxe used the West Virginia road engine miles and changed same to a percentage easy to calculation he would have used 15% the nearest round factor, instead of 16.23%, the actual percentage, and instead of 20% as used by him, in which event he would have had a surplus of $16,812.44 instead of a loss of $27,661.25, or a total difference of $44,473.69.

The Interstate Commerce Commission and practically all State Railroad Commissions agree that there is no one general factor whose application to all common expenses will fairly represent the relative expenses which should be charged to passenger and freight.

Mr. Hillman recognized the fact that the expense of maintaining tracks, fuel and water stations, engine houses, turntables, etc., where switch engines were employed, should be divided between road and yard expenses upon the basis of use, and that this division should further be divided between freight and passenger and state and interstate upon the basis of use, whereas the Norfolk & Western in their analysis and division of

expenses especially as applied to maintenance of way expenses do not consider the expenses accruing to the yard engines at all, simply ignoring it as a factor, regardless of the fact that there may be from one to six switch engines working in a yard twenty-four hours per day and wearing out tracks.

There is practically no comparison in accuracy between the operation expenses charged to passenger and freight by Mr. Hillman and Mr. Coxe, as Mr. Hillman's is based on actual percentages, conditions, and a thorough analysis of the expenses under consideration, whereas Mr. Coxe used percentages for the Norfolk & Western system as a whole, changed these percentages to one easy of calculation and maintained by it for years regardless of change in conditions and did not take into consideration the origin, source or reason for any common expense whatever.

On page 66, Mr. Coxe says that he assumed it cost as much to earn a dollar of interstate business as a dollar of intrastate business, and made no attempt whatever to ascertain what the difference in expenses was, though he did state that he knew it cost more to do intrastate business than to do interstate business. The basis chosen by him is so evidently erroneous that it needs no further consideration except perhaps the comment that it facilitated and expedited the work. Mr. Hillman, however, made an analysis based on all available facts and factors, and took into consideration in his division of expenses between interstate and intrastate not only the expenses which accrued to state and interstate equally, but also the expenses which accrued two and three times as heavy to state as to interstate, and did not attempt to facilitate or expedite his work in any way whatever, but followed the method used by him in all his cases, regardless of what the result would show. In this connection we wish to say that Mr. Hillman would have been justified in not

making any charges to intrastate expenses for the expenses incurred under the heading of Outside Agencies under Traffic Expenses, for reason that these outside agencies are not in a position to solicit intrastate business and all their expenses should therefore, be charged directly to the work benefited, or, in other words, interstate expenses. Mr. Hillman, however, did not take this advantage, but treated it the same, as if intrastate should have participated in the expenses. P. 57, Q. 59, Mr. Coxe states there is no competition on intrastate business, but that there is on inter—hence the traffic expenses must be mostly inter.

On page 106, Mr. Coxe states that in his opinion the other Items of Passenger Revenue should be assigned to interstate and intrastate upon the basis of interstate and intrastate passenger revenue, or in other words, the by-products of passenger and freight business should be made upon the basis of the passenger and freight revenue. How erroneous this assumption is can best be shown by assuming that the rate in West Virginia for the year ending June 30, 1910, had been four cents instead of two cents, and that the total passenger revenue earned would remain the same. If this had been the case, West Virginia intrastate passenger would have been entitled to twice as much of the other passenger train revenue as it received under the two cent rate, regardless of the fact that this other passenger train revenue was incidentally the same in both instances, that the railroad company received no more for handling it and that it cost the railroad company not one cent more to handle it, and still simply because the passenger rate itself was changed he would assume that the excess baggage rate, the rate on mail, express, milk on passenger trains, passenger train privileges, etc., would accrue twice as heavy to intrastate as to interstate. It will be noted that on page 117-18 of the record, X. Q. 1 to 10, Mr. Coxe's the-

ory of the assignment of the mail, express and baggage earnings to inter and intra on the basis of the passenger revenue inter and intra is most effectually disposed of on his own admissions. The logical method and the only method in the absence of the actual determination of the cost of conducting each class of passenger business, is to allow the intra and the inter such a respective proportion of these earnings as they have stood of the expenses. Had the time permitted, the proper procedure would have been to determine the expenses of conducting the express business, the mail business, the baggage business, the parcel and privilege business and the miscellaneous business and deduct that from the total passenger cost, treating each of the 116 primary accounts separately, and then determine the portion of the residue assignable to each the inter and intra passenger business. This result would hardly have changed the result save in a way favorable to the state of West Virginia, as it is a matter of common knowledge that in the mail investigations before congress and the express investigation before the Interstate Commerce Commission, the Railroads have claimed loss in each case.

Mr. Coxe again chooses the earning basis in assigning the value of property devoted to intrastate use. Again he would have twice as high a value put on the property devoted to intrastate passenger use if our total revenue and our passenger one mile intrastate remained unchanged and our rate per passenger mile intrastate had been four cents instead of two, and yet identically the same property was devoted to intrastate passenger use. The total actual value of this property was identically the same and the same number of people, the same people would have used the same facilities in the same manner and to the same extent and for the same purposes, and still, simply because the rate would have been four cents instead of two cents per passenger mile intrastate,

Mr. Coxe would have placed twice as high value upon this property devoted to intrastate passenger use. In the same manner as long as you don't change Mr. Coxe's total earnings or total operating expenses, regardless of what rate you receive per passenger mile intrastate, you would still be unable to earn a surplus on your intrastate business even if same were at the rate of ten cents per mile. This plainly shows his basis to be erroneous, and the most favorable construction that can be put upon its choice is that it was "to expedite and facilitate the work."

Considering this matter from a little different standpoint, it is evident, 1st, that the value of the property used depends on the use; 2nd, that the use is reflected by the operating expenses; 3rd, that the "capital" used by the road in conducting its business is in this analysis equivalent to the cost of the property used. That the relative operating costs of inter and intra is the true basis by which to determine the relative amount of capital used by each class of business. Hence it can readily be seen that the method used by Mr. Coxe in assigning expenses to the intra business is erroneous and illogical.

Note the cross examination of Mr. Hillman on this point, page 119 of the record.

Mr. Coxe's attempted re-analysis of the intra passenger on pages 106 and 107 of the record depend entirely on the supposition that the "by-products" of the passenger business, viz: Express, mail, baggage, etc., are assignable to intra on the earnings basis. And since that is incorrect, the re-analysis is, of course, faulty. This Court held in *Simpson* v. *Sheppard*, 230 U. S., p. 460, 461, that the earnings basis is erroneous as a general factor in all calculations pertaining to the division of expenses as between freight and passenger interstate and intrastate, and the assignment of property devoted to public use between freight and passenger, state and in-

terstate. The use of the earnings factor is erroneous except in a few instances, such as expenses which are due to the weather conditions and a few others, such as traffic expenses where no allocation is available, and that as a general factor it has no bearing whatever, either in relation to expenses, earnings or property devoted to public use. In fact, many of our very prominent railroad account officials condemned the earnings basis before the Supreme Court ruling and frankly acknowledged that the only reason they continued to apply it to their expenses and statistics was for comparative purposes and even went so far as to deny the correctness of all their statistics based upon any one general factor, such as train miles, car miles, engine miles or earnings. It is the height of absurdity to take the position that because you receive $20.00 for handling a carload of cement between two stations it costs you twice as much to handle this cement as it would to handle a carload of crushed stone, for which you receive but $10.00, when the weight of the cement and the stone was identically the same. They were both loaded and unloaded without any expense whatever to the railroad company excepting as to billing; both were handled in the same kind of car, in the same train, by the same engine and the same distance. This clearly demonstrates how erroneous the earnings basis is as a general factor, and also shows very clearly that if a rate is not remunerative, regardless of what the existing rate is, if you do not change your total earnings and if you use the earnings basis, your rate would still remain unremunerative.

We now come to Mr. Coxe's criticism on Mr. Hillman's exhibit No. 5, which gives an approximate cost per ton mile for handling intra freight. In this regard we wish to emphasize the fact that this table shows the cost per ton mile. The haulage costs may be supposed reasonably to accrue per mile hauled, as taken up and treated by Mr.

Hillman's exhibit No. 5, therefore the attempted expansion of these items under primary accounts 25, 34, 35, 80, 81, 82, 83, 84, 85, 88 and 89, as set forth on pages 110, 111 and 112, is totally inconsistent with either the ideas of Mr. Hillman or with the premise with which the paragraph is started viz: that haulage accrues per mile hauled, or, to use railroad parlance, per ton mile. As far as this consideration goes, therefore, Mr. Coxe's attempted expansion may be dismissed.

We may now turn to the "implied" considerations that Mr. Coxe intimates rather than says exist. He is very careful on this occasion not to include any of the branch tonnage statistics that he afterwards introduced on pages 109 and 110 to show the less average haul of inter and intra. It is evident from our statement in the preceding paragraph that these average hauls do not affect the haulage as it accrues per mile hauled. It is also evident from Mr. Hillman's exhibit 51 and his method of handling it as shown on pages 199 to 203 that full allowance has been made for this difference in average haul in all expense accounts where it should apply.

It is hardly worth while to follow the fanciful "corrections" of Mr. Hillman's exhibits made by Mr. Coxe, pages 113 to 116, as they all depend on Mr. Coxe's condemned revenue theory.

All the testimony of Mr. Coxe, 97 and 98, in reference to the exchange of traffic between branch and main lines is utterly futile in view of the fact that he could not quote a pound mile, only pounds. Now it is evident that a pound of freight exchanged between main line and branch line must make pound miles on main line as well as branch, and also that on the main line it has a low cost and on the branch line a high cost, but in default of the production of the data by Mr. Coxe, of the mileages made on branch and main lines, no relative cost of inter and intra can be derived from merely exchange pounds.

Mr. Coxe's figures are certainly misleading in this regard and it was with reference to showing this error and demonstrating the insufficiency of the data that the cross questions 29 to 37 on pages 103 and 104 of the record were propounded.

We direct attention to cross-questions 21 to 27, pages 102 to 103, when Mr. Coxe confidently quotes engine mile percentages to support his 20% used in the division of expenses between freight and passenger and then acknowledges that the moment his percentages are checked it falls 15% from 18.76 to 16.23 and he utterly fails to account for this. Take this in connection with his acknowledged error in his engine miles and method of assignment to W. Va., as shown on pages 72 to 77 and the conclusion is inevitable that the 16.23% is liberal to passenger and that 1907, 1908 and 1909 are erroneous.

We also direct attention to the fact that the expense set up by Mr. Coxe in his exhibits of the Kenova D. W. are based on track miles viz: 82.39% to W. Va., see Q. 46 and 47, p. 30, 31, of the record. See also cross-questions 50 to 65, pages 70 and 71, where Mr. Coxe acknowledged that road enginemen and trainmen at least accrue expenses as they make mileage. See also cross-questions 66 to 67, p. 70 and 71, where Mr. Coxe had given mileage percentage for engines, trains and cars differing decidedly from the 82.39% used. Page 73, cross-questions 75 to 80, deals in car and train miles and these figures were afterwards fully confirmed by Mr. Coxe. The expenses, however, set up by Mr. Coxe have never been corrected by him on any exhibits and it is therefore but equitable to presume that such corrections would result in costs not far greater, if any, than those of Mr. Hillman, the defendant's witness.

The attempt of the railroad to separate its intra passenger business from its inter passenger, and to segregate its passenger earnings and expenses from its freight

earnings and expenses, in order to show a confiscation of its property under the Two Cent Law, is not clear and convincing, is founded on methods of computation disapproved by this Court, and will not justify a decree sustaining the claim of confiscation.

II.

Should the Railroad Company be Allowed to Segregate Its Intra Passenger Earnings from All Other Earnings in the State in Its Attempt to Show Confiscation?

The Constitution of West Virginia makes it the duty of the Legislature to pass laws, from time to time, "applicable to all raidroad corporations in the state, establishing reasonable maximum rates of charges for the transportation of passengers and freight, and providing for the correction of abuses, the prevention of unjust discrimination between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public." Const. W. Va., Art. XI, Sec. 9.

Pursuant to this mandate the legislature passed, on December 27, 1873, Chapter 227, Acts 1872-3, an act classifying railroads according to their gross annual earnings per mile, as a basis for the determination of maximum passenger and freight rates, and fixing a maximum passenger rate; classifying goods, merchandise and all other property, and fixing maximum freight rates. In 1895 the Legislature repealed that portion of the Act of 1872, relating to freight rates, by passing an act requiring railroads to use for intrastate traffic the classification of freight rates used by them for interstate traffic, and prescribed tariffs of charges in connection therewith; and to prevent discrimination. Section 2 of that Act fixed the maximum freight rate, and, in part, is as follows:

> "Every such corporation, company, public carrier or individual shall also within thirty days after the passage of this act make a tariff of charges within this State, based

> upon the classification provided for in the first section of this act, which tariff shall show such charges for distances over ten miles, and by sections of ten miles each, from ten to three hundred miles; Provided, that the average rate of charge for all classes of freight under such classification and tariff, as fixed for the whole number of sections up to three hundred miles, shall not exceed five cents per ton per mile, except that upon gypsum, lime, guano, and other fertilizers, salt, flour in barrels, and upon coal, pig-iron, limestone, iron ore and undressed stone, logs or lumber, such average rate of freight shall not exceed three cents per ton per mile."
>
> *N. & W. Ry. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 574.

In 1907 the Act complained of was passed fixing a Two Cent rate for intrastate passengers. It was held by the Supreme Court of West Virginia in *Railway Co.* v. *Conley and Avis*, 67 W. Va., p. 174:

> "This Act (the 2 cent rate act of 1907) is in form an independent separate act, but in legal effect, an amendment of the other statutes relating to the subject matter thereof, in existence at the date of its passage. The intent to amend is not expressed in terms. It does not say the act of 1873, as amended by the act of 1895, is hereby amended, but that is necessarily implied, for it is thrown in with the mass of former legislation to become effective and operative as a part thereof and displace so much of it as is inconsistent. It is an amendment by implication, repealing existing laws so far, and only so far, as it is inconsistent therewith."

This act should not be segregated, but considered as a part of and in the light of the entire state legislation regulating passenger and freight rates. This was done by the Court in *Simpson* v. *Sheppard*, where the 2 cent rate Act of April 1, 1907, was considered with the order of the Commission of Nov. 15, 1906, fixing maximum class rates for general merchandise. The State has not regulated intrastate passenger rates separately by that Act as stated in brief for appellant, and it should not be considered separately by this Court in determining if the same is confiscatory.

It will be observed that liberal maximum freight rates are allowed to be charged. It is the legislative policy to give greater returns on the freight traffic and lesser returns on the passenger traffic. This the legislature has the right to do. It can constitutionally enact that persons shall be transported at a lesser rate than property, if reasonable returns are allowed to the railroad.

In the year 1907 the intra passenger business of the railroad was 4.49% of the entire business and the freight traffic was 95.51% of the entire business. (p. 32, printed record.) The net earnings for that year from operations in West Virginia were over 8% (not subtracting from net earnings the amount charged to betterments). In that year the common stock received 5% dividend. The preferred stock has regularly received 4% dividends for many years. Practically the same figures exist for 1908, 1909, and 1910. Common stock received 4½% in 1908; 4% in 1909; and 5% in 1910. In 1911 after paying all operating expenses, fixed charges, and the 4% to the preferred stock the railroad could have paid its common stock 9% plus if it had not put over 2½ millions into additions and betterments. For that year the common stock received 5% (p. 88, record). In 1912 the net earnings were 9.9%, if about 1 1-3 millions had not been charged to improvements and betterments. The common stock received 5%. Pending this suit the common stock has been increased from 66 millions to $85,653,000.-00, an increase of $19,653,000.00 and increased dividends have been paid thereon, including this increased stock. (p. 91, record.) The market value of the common stock in 1910 was 96 to 98.

The costs of betterments is obviously capital invested and if taken out of the earnings of the railroad, (as has been done every year under consideration in this litigation) ought to be regarded for purposes of rate making, as a part of the net earnings. Otherwise a railroad could

absorb all or a great part of its net earnings in the costs of betterments of its property, and be in a position in almost any year to say it is not earning a fair return on its investment.

Railway Co. v. *U. S.*, 99 U. S. 402, 420.

Obviously this complainant has been making exceptionally large net earnings under the Two Cent rate law. The intra passenger business is a very small part of its business, in this State, less than 5%, and should be regarded as a subsidiary business. Its main line in West Virginia taps the richest coal field in the world. It was built for that purpose. It has been estimated that only ½ of 1% of the rich deposits of coal within its "sphere of influence" has been removed. Its passenger business is merely incidental; and yet taking the figures of complainant, based as they are upon improper valuation, and unfair in the division of income and expenses with the freight business, it is shown that the intrastate passenger business does not draw on the other departments for operating expenses, but contributes substantially above operating expenses to the general return.

The Interstate Commerce Commission lays down the sound proposition that not all classes of traffic can be expected or required to contribute equally to returns on investments and that as long as some return above handling costs, i. e., that the traffic contributes something to overhead expenses (not returns on investment, mark you, but overhead expenses) that the rate may not be unreasonable, but have its place as a filler to other business and as relieving the other business from burdens that it would otherwise have to carry alone. In this case the intra passenger business not only so contributes to the overhead expenses but bears its full share of such expenses and contributes to relieve the other classes of business from the full burden of the interest charges.

We would present most earnestly for the consideration

of the Court, that all classes of business cannot be equally remunerative; that the very classification of freight rates into 1st, 2nd, 3rd, etc., classes indicates that other considerations than cost enter into the railroad problem. That distance from markets of a commodity must be recognized, and the needs of the market community might necessitate the reduction of a rate to a low remunerative basis, and yet it would contribute to lessen the burden on other commodities, for instance grain from Western producing states needed to supply Eastern communities. That this status exists on the N. & W. in reference to the passenger business is indicated on page 51 of the record, cross-question 24, where Mr. Coxe acknowledged that the "freight business is the great money-making business of it" (the N. & W.) Examination of Mr. Coxe's exhibits D-1, etc., show that only 11 to 12% of the business is passenger and a very small proportion of that intrastate.

Under the facts this complainant should not be allowed to separate its intra passenger business from the great bulk of its operations bringing in extraordinary returns, and ask relief against "*Confiscation.*"

This Court has declared repeatedly that if the State allows a railroad to earn suitable revenue from its business as a whole it may require the company to carry at unprofitable rates upon separate parts of the road, (*St. Louis* v. *Gill*, 156 U. S. 649, 15 Sup. Ct. 489, 39 L. ed. 567), and upon separate kinds of traffic. *Minnesota Rate Case*, 230 U. S. 352. In this last cited case the Court said:

> "We express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments. For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account."

Also in *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257, 46 L. ed. 1151, where coal rates were considered, the Court said:

"Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smythe* v. *Ames*, we expressed the opinion that reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. (quoted in appellant's brief, p. 15) but it by no means follows that the companies are entitled to earn the same percentage of profit upon all classes of freight carried***. We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the commission in this particular."

The same principle is announced in *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382.

In *Atlantic C. L. R. Co.* v. *North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, the railroad company was required to maintain a daily passenger train at a loss, where it was not shown that loss would make the net return on the state business so low as to make it confiscatory.

"The courts will not interfere or grant relief to a railroad company upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety."

Pensacola & Atlantic R. Co. v. *Florida*, 3 L. R. A. 661.

An allegation that statutory rates were inadequate was held bad on demurrer by the Supreme Court of Arkansas because it did not aver that the statutory rates prevented a profit on the company's traffic *as a whole.*

60 Ark. 221; 29 S. W. 752.

This company is making large returns on its intra passenger and freight business, paying dividends, investing net earnings in improvements, in short, making between 6% and 8% on its investment. If its intra passenger business is not remunerative, it follows that its freight business is more than remunerative, and it is charging unjust and unreasonable rates for its freight. In one branch it claims injustice, while in the other branch it is admittedly perpetrating that same injustice, and appeals to a court of equity. "He that seeks equity, must do equity." The investment of the stockholders is in the entire property, and not in the passenger or freight departments, and the state by its legislature has permitted a handsome return on the entire property. The reduction occasioned by the Two Cent Law on the returns would be negligible, a small fraction of 1%.

The reasoning of Justice Mestrezat in his dissent in *Penna R. R. Co.* v. *Philadelphia*, 220 Pa. St. Reports at page 122 is pertinent:

> "I am clearly of the opinion that in determining whether a rate for transportation is reasonable or not, all the revenues of the company should be considered, including receipts from freight, expressage, packages and all other sources. This principle is recognized in the adjudications of the Supreme Court of the United States, and by the decisions of the Interstate Commerce Commission; St. Louis & San Francisco Ry. Co. v. Gill, 156 U. S. 649; Smythe v. Ames, 169 U. S. 466; Board of Comm'rs. v. Railway Co., 7 Interst. Com. Rep. 69; Brabham v. Atlantic Coast Line R. R. Co., 11 Interst. Com. Rep. 464. In ascertaining a reasonable rate for the transportation of passengers, the company has no right to segregate the passenger traffic and exclude the other sources of revenue. The railroad is an entity, its being is created by a charter granted by the commonwealth declaring it 'a public highway for the conveyance of passengers and the transportation of freight'; it acts as a body, its tracks are all owned and used by the corporate entity, and its stockholders receive their dividends from the net proceeds of its entire traffic. Why, then, in ascertaining a reasonable rate for passenger traffic should the revenue from that traffic alone be considered? The stockholders are

> the owners of the corporate franchises, as well as of the corporate property generally, and a fair income from the investment is what they are entitled to receive; hence they have no right to compel the passenger traffic on their road to pay a rate of transportation which, when considered with the return from the freight and other traffic, would make an exorbitant or unfair rate to them on their investment. Their investment is in the corporate franchise and property, and the income from that investment necessarily comes from the freight as well as the passenger traffic, and, in determining what is a fair and reasonable return on their investment, it necessarily follows that the receipts or revenues from all sources should be considered. This view is strengthened by the fact that it is impossible to accurately determine what revenue the company receives from each of the several sources. The trackage, the stations, the offices and other property are owned, not by the freight department nor by the passenger department of the road, but by the company itself, and hence, in making a division of the receipts and expenditures, it is wholly impracticable to ascertain accurately and definitely the receipts from either of the several sources of revenue. As the net revenues from all sources go to the stockholders, constituting the return on their investment, and the property from which those revenues are derived is the property of the stockholders, the fair rate or recompense for the investment in that property belongs to the stockholders, and should be counted on the entire traffic."

Rate of Return on Investment.

The question of the rate of return is not important in this case, as we deem it will be conceded that 6% plus is reasonable. In 1869 this Court said:

> "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. **** Each case must depend upon its special facts."
>
> *Covington & L. T. R. Co. v. Sanford*, 164 U. S. 578.

This Court has not named the rate of return to which a railroad would be entitled upon proper valuations in normal cases. The state and lower federal courts pre-

sent a wide range. The rule announced by Justice Brewer, then in the Circuit Court, in 1888, in the case of *Chicago and Northwestern* v. *Dey*, 35 Fed. 866: "That where the proposed rates will give some compensation, however small, to the owners of the railroad property the courts have no power to interfere. Appeal must be then made to the legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates;" has been modified, and properly so, and now the general rule seems to be that reasonable rate of return should be allowed, depending upon the circumstances in each case.

The decree of the lower court should be affirmed.

A. A. LILLY,

Attorney General of West Virginia.

October, 1914.